

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

To be argued by
DIANE R. EISNER

75-7700

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

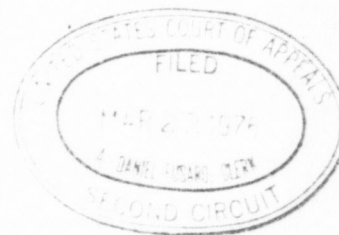
GEORGE HANZIMANOLIS,

Plaintiff-Appellant,

-against-

MICHAEL J. CODD, as Police
Commissioner of the City of
New York,

Defendant-Appellee.



Appeal from the United States District
Court for the Southern District of New
York

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE HANZIMANOLIS,

Plaintiff-Appellant,

-against-

MICHAEL J. CODD, as Police Commissioner
of the City of New York,

Defendant-Appellee.

APPELLEE'S BRIEF

Statement

This appeal is taken from an order of the United States District Court for the Southern District of New York (WEINFELD, J.), entered November 17, 1975, which dismissed appellant's complaint upon a finding that the claims asserted under the Civil Rights Act were fully litigated in state court proceedings and are therefore barred by the doctrine of res judicata.

Question Presented

Did the Court below correctly conclude that res judicata bars the instant action?

Facts

On November 9, 1972, appellant was dismissed from his position with the New York City Police Department following a departmental trial in which he was found guilty of four specifications of misconduct (61).*

* Numbers in parentheses refer to the pages of the Appendix.

In late September, 1970, an anonymous caller had alleged that appellant was involved in the homicide of one Dr. Sidney Shapiro. Appellant was thereafter questioned by the New York State Police in the presence of investigators from the New York City Police Department (57).

In June, 1971, appellant was questioned by representatives of the Internal Affairs Division of the New York City Police Department, at which time he said that the statements he had made to the State Police were false. During the course of this questioning, appellant answered "I don't recall" to specific questions. Also during the course of the investigation it was disclosed that appellant had been "moonlighting" without the permission of the Police Commissioner, and that he had registered a vehicle in New Jersey although he was not a resident of that state (57-58).

On August 9, 1971, appellant was charged with five specifications of misconduct which alleged in substance, (1) that he was "moonlighting" without permission from the Police Commissioner, (2) that he wrongfully registered a vehicle in New Jersey, (3) that he knowingly made false statements to the New York State Police during an official homicide investigation, (4) that he cohabited with a woman while being lawfully married to another, and (5) that he gave evasive answers during an official New York City Police Department interview (50-51).

At the conclusion of the departmental trial, the Deputy Commissioner in Charge of Trials determined that appellant was "not guilty" of Specification No. 3 and "guilty" of the other four specifications. He recommended that appellant be dismissed from the department (59). The Police Commissioner accepted the recommendation and ordered appellant dismissed (61).

Thereafter appellant commenced an Article 78 proceeding to review the determination of the Police Commissioner (13). In his brief to the Appellate Division of the Supreme Court of the State of New York, First Department, appellant argued that although he had not been charged with the homicide of Dr. Shapiro, his dismissal from the Police Department was based upon the Trial Commissioner's "finding" that he was guilty of "suspicion" of the homicide (16-17). Appellant based this claim upon a statement included in the Trial Commissioner's findings that, "There is an obvious suspicion that the respondent was involved in the homicide of Dr. Shapiro but apparently there is no proof that he was responsible for his death." The respondent in the Appellate Division explained that the statement was merely a piece of information in the report and in no way affected the specific findings that appellant was guilty of four independent specifications (19).

On or about October 9, 1973, the Appellate Division unanimously affirmed the determination of the Police Commissioner (14). Thereupon appellant took an

appeal as of right to the Court of Appeals of the State of New York, which appeal was dismissed. His subsequent motions for leave to appeal were denied by the Appellate Division and the Court of Appeals (14).

Appellant then petitioned the Supreme Court of the United States for a writ of certiorari, which was denied on November 11, 1974 (14).

In every one of these stages of the state court process, appellant's claim was that his right to due process under the New York State and United States Constitutions was denied by the Police Department's finding him guilty of "suspicion" of a homicide when he was not charged with involvement in that homicide (16, 24-27, 34, 38).

On March 3, 1975 appellant commenced this action, under the Civil Rights Acts, alleging that he was wrongfully deprived of his Civil Service position under color of law in derogation of the United States Constitution since he was, in fact, discharged "because the Police Department suspected he was involved in the homicide of Dr. Shapiro." (8, 9, 12).

On July 8, 1975, appellee moved pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss the complaint on the grounds that the instant action is barred by the principles of res judicata and collateral estoppel (12). On November 12, 1975, the District Court granted appellee's motion to dismiss (66).

The District Court, in granting the motion,
stated:

"[I]t is beyond challenge that [appellant] raised and litigated at every stage of his state court proceeding the very constitutional issue he now seeks to have adjudicated by this court. He may not relitigate the very same issue in this court by asserting a claim under the Civil Rights Act. * * * To allow the maintenance of this action would not only mean a duplication of the state process, but render the doctrine of res judicata and its counterpart, collateral estoppel, meaningless." (71-72).

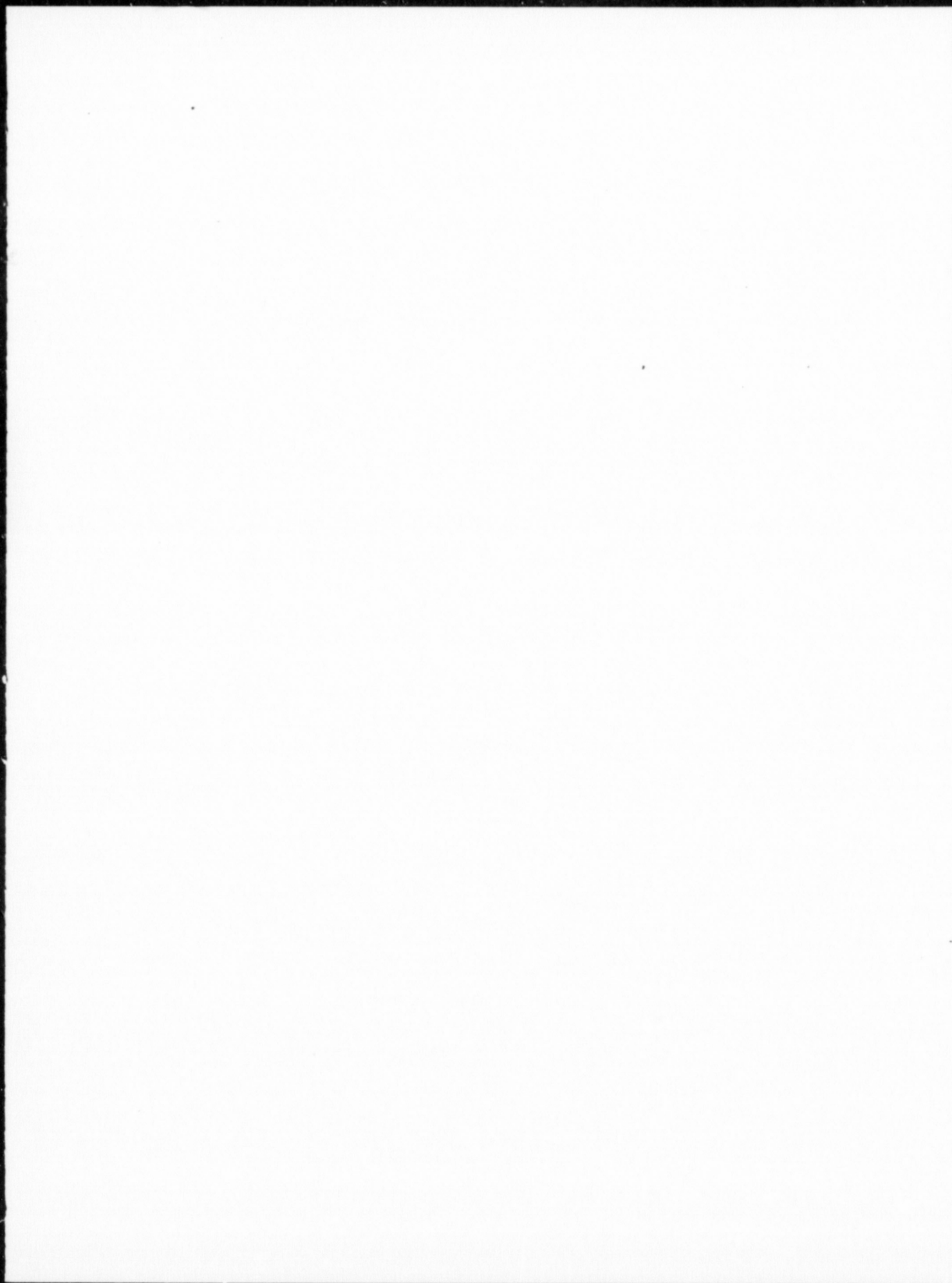
ARGUMENT

APPELLANT IN THIS CIVIL RIGHTS ACTION RAISES THE EXACT CLAIMS WHICH WERE FULLY LITIGATED IN STATE COURT PROCEEDINGS. THE COURT BELOW PROPERLY GRANTED APPELLEE'S MOTION TO DISMISS THE COMPLAINT UPON THE GROUND THAT THE CLAIM IS BARRED BY RES JUDICATA.

In Angel v. Bullington, 330 U.S. 183 (1947), the Supreme Court of the United States stated (at page 193):

"The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion.... And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

In the instant case, appellant's claim that he was, in fact, dismissed from the Police Department because the Trial Commissioner found him guilty of "suspicion" of a homicide, has already been presented to the Appellate Division of the Supreme Court of the State of New York, the Court of Appeals of the State of New York, and the



Supreme Court of the United States.

In this particular action, brought under the Civil Rights Acts, appellant raises no new claims which have not been fully litigated.

In Lombard v. Board of Education, 502 F. 2d 631, (2d Cir., 1974), cert. den., 420 U.S. 976 (1975), this Court stated (at page 636-37):

"Of course, where a constitutional issue is actually raised in the State court, as it can be in an Article 78 proceeding...the litigant has made his choice and may not have two bites at the cherry."

See also, Thistlewaite v. City of New York, 497 F. 2d 339 (2d Cir., 1974).

Clearly appellant herein has raised and litigated the precise claims asserted in his amended complaint in the district court. That court properly dismissed the complaint under the doctrine of res judicata.

CONCLUSION

The order and decision of the court below should be affirmed, with costs.

March 19, 1976

Respectfully submitted,

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